U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 30 January 2007 In the Matter of

D. R.
Claimant

Case No. 2006-BLA-00027

v.

TROJAN MINING AND PROCESSING COMPANY
Employer

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS
Party-in-Interest

APPEARANCES:[1]
D.R., Pro se.
Claimant
Shawn Conley, Esquire and J. Logan Griffith, Esquire
For the Employer

BEFORE: DANIEL F. SOLOMON
Administrative Law Judge

DECISION AND ORDER

AWARD OF BENEFITS

This proceeding arises from a request for benefits under the Black Lung Benefits Act, 30 U.S.C. § 901 *et seq.* In accordance with the Act and the pertinent regulations, this case was referred to the Office of Administrative Law Judges by the Director, Office of Workers' Compensation Programs for a formal hearing requested by the Claimant October 25, 2005. Director's Exhibit ("DX") 62.

Claimant was last employed in coal mine work in the state of Kentucky, the law of the United States Court of Appeals for the Sixth Circuit controls. See ***Shupe v. Director, OWCP***, 12 BLR 1-200, 1-202 (1989)(en banc). Since Claimant filed this application for benefits after January 1, 1982, Part 718 applies.

The Claimant filed a claim for black lung benefits pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, on August

[1] The Director, Office of Workers' Compensation Programs, was not present nor represented by counsel at the hearing.

25. 1992 (DX 19.). This claim was denied in a Decision and Order of Judge Rudolf Jansen dated February 21, 1995 (DX 19-31). The Do appealed to the Benefits Review Board but in a decision dated September 29, 1995, the Decision and Order was sustained. An appeal was taken to the 6th Circuit Court of Appeals, but in the interim the Claimant filed a second application on June 14, 1996. The appeal was denied by the Circuit Court on May 29, 1996, and a request for reconsideration was also denied on July 12, 1996. DX 19-2.

A third application, a second duplicate claim, was filed on July 29, 1997 (DX 1. Also see DX 24, 16). There is no indication whether the 1996 application merged or was consolidated with the 1997 application. The Claim was denied by the district Director on November 19, 1997 (DX 11). On January 12, 1998, the Claimant requested a hearing (DX 12). A second hearing before an administrative law judge, Judge Daniel Roketenetz, was held August 12, 1998. In a Decision and Order dated April 29, 1999, the claim was rejected, again on the basis that he failed to establish the medical issues. Again, the Claimant appealed to the Benefits Review Board. While the appeal was pending, the Claimant filed newly discovered medical evidence. By Order, the Benefits Review Board remanded the case to the District Director to reconsider the claim as a request for modification in light of the newly submitted evidence (DX 21-121). The District Director issued a Proposed Decision and Order Denying Request for Modification (DX 24, 16). The Claimant requested a hearing. A third hearing was held in Prestonsburg, Kentucky, November 28, 2001 again before Judge Roketenetz. On April 17, 2002, another Decision and Order denying the claim was entered. Again, Judge Roketenetz determined that the Claimant failed to establish any of the medical issues. DX 24-224. Again the Claimant filed an appeal. DX 24-225. Again the Claimant submitted newly discovered evidence. Again the Benefits Review Board remanded for modification on August 15, 2002. Again, the District Director issued a proposed order denying modification on December 10, 2002. DX 24-16. On December 18, another request for hearing was filed. DX 24-15.

On October 30, 2003, a fourth hearing was held by Judge Robert Hillyard. In a decision dated March 25, 2004, Judge Hillyard ruled that the Claimant failed to establish a material change in conditions or show that there was a mistake of fact in the prior decision. (DX 34). On April 26, 2004, the Claimant filed a request for reconsideration (DX 35). That request was denied on May 26, 2004. (DX 37). On August 6, 2004, the Claimant filed another modification request (DX 38). On September 26, 2005, a Proposed Decision and Order was rendered by the District Director (DX 61). The request for hearing was filed October 25, 2005 (DX 62). The file was transmitted to this office on January 4, 2006 and a fifth hearing was held October 31, 2006 in Pikeville.

Sixty seven Director's Exhibits (DX 1-DX 67) were admitted into the record for identification. See transcript, "TR" 43. Five Claimant's Exhibits ("CX" 1- CX 5, TR 8-10) and two Employer's exhibits ("EX" 1 – EX 2, TR 40) were also admitted. Post hearing, the record remained open to give the parties an opportunity to comment, but nothing has been received.

The Claimant was born on September 4, 1949 (Tr. 11). He is a high school graduate (Tr. 12). The Claimant has one dependent for purposes of augmentation of benefits; namely, his wife, whom he married on January 13, 1971 (DX 1). The Claimant testified that he smoked for approximately 25 years at a rate of one pack per day, quitting somewhere around 2000 (Tr. 20-21). This testimony is substantiated by the physicians' records. Judge Hillyard found that the Claimant has a

smoking history of one pack of cigarettes per day for 25 years, quitting somewhere near 2000.

APPLICABLE STANDARDS

Because the Claimant filed this application for benefits after March 31, 1980, the regulations set forth at part 718 apply. ***Saginaw Mining Co. v. Ferda***, 879 F.2d 198, 204, 12 B.L.R. 2-376 (6th Cir. 1989).

This case represents a duplicate claim for benefits under regulations in force prior to January 21, 2001. To receive black lung disability benefits under the Act, a miner must prove that (1) he suffers from pneumoconiosis, (2) the pneumoconiosis arose out of coal mine employment, (3) he is totally disabled, and (4) his total disability is caused by pneumoconiosis. ***Gee v. W.G. Moore and Sons***, 9 B.L.R. 1-4 (1986) (en banc); ***Baumgartner v. Director***, OWCP, 9 B.L.R. 1-65 (1986) (en banc). ***See Mullins Coal Co., Inc. of Virginia v. Director***, OWCP, 484 U.S. 135, 141, 11 B.L.R. 2-1 (1987). The failure to prove any requisite element precludes a finding of entitlement. ***Anderson v. Valley Camp of Utah, Inc.***, 12 B.L.R. 1-111 (1989); ***Perry v. Director***, OWCP, 9 B.L.R. 1-1 (1986) 1-1 (1986) (en banc).

STIPULATIONS AND WITHDRAWAL OF ISSUES

1. The Claimant is a "miner" as that term is defined by the Act, and has worked after 1969. DX 33, at 9-10.

3. The Employer agreed that the Claimant had 21 years of coal mine employment. TR 43, DX 33, at 9-10.[2]

4. Trojan Mining and Processing is the responsible operator. DX 33, at 9-10.

5. The Claimant has one dependent. DX 65, DX 33, at 9-10.

After a review of the stipulations and the record, they are accepted.

REMAINING ISSUES

1. Whether the miner suffers from pneumoconiois.
2. If so, whether the miner's pneumoconiosis arose out of coal mine employment.
3. Whether the miner is totally disabled from a respiratory impairment.
4. Whether the miner's total disability is due to pneumoconiosis.

BURDEN OF PROOF

"Burden of proof," as used in this setting and under the Administrative Procedure Act[3] is that "[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof." "Burden of proof" means burden of persuasion, not merely burden of production. 5

[2] In the prior decisions, the Employer stipulated to 20 years of coal mine employment. Judge Hillyard found 20 years of coal mine employment. DX 34.

[3] 33 U.S.C. § 919(d) ("[N]otwithstanding any other provisions of this chapter, ant hearing held under this chapter shall be conducted in accordance with [the APA]; 5 U.S.C. § 554(c)(2). Longshore and Harbors Workers' Compensation Act ("LHWCA") 33 U.S.C. § 901-950, is incorporated by reference into Part C of the Black Lung Act pursuant to 30 U.S.C. § 932(a).

U.S.C. § 556(d).[4] The drafters of the APA used the term "burden of proof" to mean the burden of persuasion. ***Director, OWCP, Department of labor v. Greenwich Collieries [Ondecko]***, 512 U.S. 267, 18 B.L.R. 2A-1 (1994).[5]

A Claimant has the general burden of establishing entitlement and the initial burden of going forward with the evidence. The obligation is to persuade the trier of fact of the truth of a proposition, not simply the burden of production; the obligation to come forward with evidence to support a claim. Therefore, the Claimant cannot rely on the Director to gather evidence. The Claimant bears the risk of non-persuasion if the evidence is found insufficient to establish a crucial element. ***Oggero v. Director, OWCP***, 7 B.L.R. 1-860 (1985).

20 C.F.R. § 725.309: Subsequent Claims

Any time within one year of a denial or award of benefits, any party to the proceeding may request a reconsideration based on a change in condition or a mistake of fact made during the determination of the claim; *See* 20 C.F.R. §725.310. Neither party made such a request.

However, after the expiration of one year, the submission of additional material or another claim is considered a subsequent claim which will be denied on the basis of the prior denial unless the claimant demonstrates that one of the applicable conditions of entitlement has changed since the date upon which the order denying the prior claim became final. § 725.309(d) (2001). Under this regulatory provision, according to the Court of Appeals for the Sixth Circuit in ***Sharondale Corp. v. Ross***, 42 F.3d 993, 997-998 (6th Circuit 1994):

> [T]o assess whether a material change is established, the ALJ must consider all of the new evidence, favorable and unfavorable, and determine whether the miner has proven at least one of the elements of entitlement previously adjudicated against him. If the miner establishes the existence of that element, he has demonstrated, as a matter of law, a material change. Then, the ALJ must consider whether all of the record evidence, including that submitted with the previous claims, supports a finding of entitlement to benefits.

MODIFICATION

The Miner's lifetime claim comes as the result of the claimant's request for a modification of the previous denial of this claim. The modification provision in §725.310 states that upon the initiative of the deputy commissioner or at the request of any party, the fact finder may reconsider a denial of benefits within one year of that denial. 20 C.F.R. §725.310. The fact finder is authorized to modify an award or a denial of benefits based upon a change in conditions or a mistake in a determination of fact. In determining whether Claimant has established a change in conditions pursuant to §725.310, an independent assessment of the newly submitted evidence, considered in conjunction with the previously submitted evidence, must be performed, to determine if the weight of the new evidence is sufficient to establish the element or elements

[4] The Tenth and Eleventh Circuits held that the burden of persuasion is greater than the burden of production, ***Alabama By-Products Corp. v. Killingsworth***, 733 F.2d 1511, 6 B.L.R. 2-59 (11th Cir. 1984); ***Kaiser Steel Corp. v. Director***, OWCP [Sainz], 748 F.2d 1426, 7 B.L.R. 2-84 (10th Cir. 1984). These cases arose in the context where an interim presumption is triggered, and the burden of proof shifted from a Claimant to an employer/carrier.

[5] Also known as the risk of non-persuasion, *see* 9 J. Wigmore, Evidence § 2486 (J. Chadbourn rev. 1981).

of entitlement which defeated entitlement in the prior decision. See **Nataloni v. Director, OWCP,** 17 BLR 1-82(1993).

TIMELINESS

Timeliness is a jurisdictional matter that can not be waived. 30 U.S.C. § 932(f), provides that "[a]ny claim for benefits by a miner under this section shall be filed within three years after whichever of the following occurs later": (1) a medical determination of total disability due to pneumoconiosis; or (2) March 1, 1978. The Secretary of Labor's implementing regulations at 20 C.F.R. § 725.308 sets forth in part, as follows:

(a) A claim for benefits filed under this part by, or on behalf of, a miner shall be filed within three years after a medical determination of total disability due to pneumoconiosis which has been communicated to the miner or a person responsible for the care of the miner, or within three years after the date of enactment of the Black Lung Benefits Act of 1977, whichever is later. There is no time limit on the filing of a claim by the survivor of a miner.

(c) There shall be a rebuttable presumption that every claim for benefits is timely filed. However, except as provided in paragraph (b) of this section, the time limits in this section are mandatory and may not be waived or tolled except upon a showing of extraordinary circumstances.

I have reviewed all of the evidence in the record and there is no evidence to rebut the presumption.

MEDICAL EVIDENCE SUMMARY

Current X-rays

Exhibit No.	Physician	BCR/BR	Date of film	Reading
EX 1	Jarboe	B	8/31/06	0,1
CX 3	Poulos	B, BCR	8/31/06	1,0

There are numerous x-rays in the prior record. However these are conflicted. The most recent were negative, dated March 3, 2003. DX 29-4, DX 31-6.

Pulmonary function studies

Exhibit No.	Physician	Date of study	Tracings present?	Flow-volume loop?	Broncho-dilator?	FEV1	FVC/ MVV	Coop. and Comp. Noted?
EX 1	Jarboe	8/31/06	Yes	Yes	Yes	53% 54%	99% 104%	Good
						54% 56%	46% 44%	
DX 52, DX 53	Mettu	3/7/03	Yes	Yes	No	2.06	2.49	Good

Blood gas studies

Exhibit No.	Physician	Date of Study	Altitude	Resting (R) Exercise (E)	PCO2	PO2	Comments

EX 1	Jarboe	8/31/06	0-2999	R	35.7	102	Normal

Medical Reports

Thomas Jarboe, M.D.

Dr. Jarboe, board certified in internal medicine and pulmonology examined the Claimant for the Employer on August 31, 2006 art Pikeville Hospital. EX 2. After the testing, Dr. Jarboe provided the following diagnosis:

1. Asthmatic bronchitis.
2. Obstructive sleep apnea.
3. Coronary artery disease, status post coronary artery bypass grafting.
4. Diabetes mellitus. Possible congestive heart failure (based on known coronary disease and enlargement of the cardiac shadow).

Dr. Jarboe, relying on his negative x-ray determined that the Claimant does not have pneumoconiosis but is totally disabled from a respiratory standpoint. Spirometry indicated the Claimant has a severe restrictive effect. EX 2 at 20. He noted that the Claimant "does have changes in his pulmonary function which would be compatible with a dust induced lung disease. He has a proportionate reduction in FVC and FEVI." However, he noted that there are a number of possible causes for this reduced FVC. EX 1, EX 2.

William Fannin, M.D.

Dr. Fannin submitted a series of reports. In the new evidence, a note dated December 16, 2004, Dr. Fannin renders an opinion that the Claimant is totally disabled from both clinical and legal pneumoconiosis. He noted that the lung condition was aggravated by coal dust from coal mine employment. DX 46. In response to a written interrogatory, Dr. Fannin amplified on this opinion, referencing a positive 1991 x-ray reading by Dr. Anderson and Dr. Mettu's spirometry. DX 53. Dr. Fannin referenced his readings of x-ray reports and his physical examinations of the Claimant over a ten year period. Id. Later, an opinion is rendered that the Claimant should not be subjected to further testing due to his fragile condition. DX 55.

"Other" Medical Evidence

Exhibit No.	Physician	Date of Medical Report	Type of Procedure	Comments
CX 3, CX 4	Narra	9/19/06	CT	1.3 CM mass, suggestive for pneumoconiosis.

Hospitalization Records and Treatment Notes

Records submitted from William T. Fannin for eight office visits the period April 5, 2005 to July 5, 2006 render a diagnosis of pneumoconiosis, degenerative joint disease, diabetes, hypertension and heart problems. CX 1. Records from June 24, 2002 to November, 2003, include 9 office visits. During this time the diagnosis includes chronic obstructive pulmonary disease and pneumoconiosis and the Claimant had sleep studies, had an accident involving muscular complaints, and had bypass cardiac surgery and a follow-up heart catherization. DX 40.

FINDINGS OF FACT

TOTAL DISABILITY

To receive black lung disability benefits under the Act, a claimant must establish total disability due to a respiratory impairment or pulmonary disease. If a coal miner suffers from complicated pneumoconiosis, there is an irrebuttable presumption of total disability. 20 C.F.R. §§ 718.204(b) and 718.304. If that presumption does not apply, then according to the provisions of 20 C.F.R. §§ 718.204(b)(1) and (2), in the absence of contrary evidence, total disability in a living miner's claim may be established by four methods: (i) pulmonary function tests; (ii) arterial blood-gas tests; (iii) a showing of cor pulmonale with right-sided, congestive heart failure; or (iv) a reasoned medical opinion demonstrating a coal miner, due to his pulmonary condition, is unable to return to his usual coal mine employment or engage in similar employment in the immediate area requiring similar skills.

Although the Claimant provided CT evidence that may be interpreted to show complicated pneumoconiosis exists, I find that the record does not contain sufficient evidence that Claimant has complicated pneumoconiosis and there is no evidence of cor pulmonale with right sided congestive heart failure. As a result, the Claimant must demonstrate total respiratory or pulmonary disability through pulmonary function tests, arterial blood-gas tests, or medical opinion.

All of the recent medical reports accept and the record shows that Claimant has established total respiratory disability. EX 2 at 31.

Therefore, I find that the Claimant has established one of the criteria under 20 CFR § 725.309, total disability.

Existence of Pneumoconiosis

Pneumoconiosis is defined as a chronic dust disease arising out of coal mine employment.[6] The regulatory definitions include both clinical (medical) pneumoconiosis, defined as diseases recognized by the medical community as pneumoconiosis, and legal pneumoconiosis, defined as any chronic lung disease. . .arising out of coal mine employment.[7] The regulation further indicates that a lung disease arising out of coal mine employment includes any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. § 718.201(b). As several courts have noted, the legal definition of pneumoconiosis is much broader than medical pneumoconiosis. ***Kline v. Director, OWCP***, 877 F.2d 1175 (3d Cir. 1989).

A living miner can demonstrate the presence of pneumoconiosis by: (1) chest x-rays interpreted as positive for the disease (§ 718.202(a)(1)); or (2) biopsy report (§ 718.202(a)(2)); or the presumptions described in Sections 718.304, 718.305, or 718.306, if found to be applicable; or (4) a reasoned medical opinion which concluded the disease is present, if the opinion is based on objective medical evidence such as blood-gas studies, pulmonary function tests, physical examinations, and medical and work histories. (§ 718.202(a)(4)).

X-ray Evidence

The record I consider under the rules for limitations on evidence involves two readings of a single x-ray in the current record. The prior record includes x-rays, but they are more than three years old and as they are conflicted, I find they are not as helpful as the newer evidence. Because

[6] 20 C.F.R § 718.201(a).
[7] 20 C.F.R. § 718.201(a)(1) and (2) (emphasis added).

pneumoconiosis is a progressive and irreversible disease, it may be appropriate to accord greater weight to the most recent evidence of record, especially where a significant amount of time separates newer evidence from that evidence which is older. ***Clark v. Karst-;Robbins Coal Co***., 12 B.L.R. 1-;149 (1989)(en banc); ***Casella v. Kaiser Steel Corp***., 9 B.L.R. 1-;131 (1986). The Claimant relies a reading by a dually qualified, board certified radiologist B reader, Dr. Poulos. The Employer relies on a reading by Dr. Jarboe, who is a B reader, but who is not dually qualified.

The weight I must attribute to the x-rays submitted for evaluation with the current application are in dispute. "[W]here two or more X-ray reports are in conflict…consideration shall be given to the radiological qualifications of the physicians interpreting such X-rays." 718.202(a)(1). I am "not required to defer to…radiological experience or…status as a professor of radiology." ***Dempsey v. Sewell Coal Co***., 23 BLR 1-47 (2004).

I note that of the readers of record, Dr. Poulos is the best qualified.

I note that the preponderance of the readings is in equipoise.

The Board has held that I am not required to defer to the numerical superiority of x-ray evidence, ***Wilt v. Wolverine Mining Co***., 14 B.L.R. 1-70 (1990), although it is within his or her discretion to do so, ***Edmiston v. F & R Coal Co***., 14 B.L.R. 1-65 (1990). See also ***Schetroma v. Director, OWCP***, 18 B.L.R. 1- (1993) (use of numerical superiority upheld in weighing blood gas studies); ***Tokaricik v. Consolidation Coal Co***., 6 B.L.R. 1-666 (1984) (the judge properly assigned greater weight to the positive x-ray evidence of record, notwithstanding the fact that the majority of x-ray interpretations in the record, including all of the B-reader reports, were negative for existence of the disease). See also ***Woodward v. Director, OWCP***, 991 F.2d 314 (6th Cir. 1993).

In this case, the expert opinions of the most qualified reader dictate a conclusion that outweighs the numerical number of opinions, at equipoise. The evidence from the prior record is inconclusive. The Claimant has a burden to prove the existence of pneumoconiosis by a preponderance of the evidence. ***Director, OWCP, Department of labor v. Greenwich Collieries [Ondecko],*** *supra.*

I give credit to Dr. Poulos' opinion, based on his qualifications. I find that pneumoconiosis has been established by x-ray by a preponderance of the evidence.

Biopsy and Presumption

Claimant has not established pneumoconiosis by the provisions of subsection 718.202(a)(2) since no biopsy evidence has been submitted into evidence. The presumptions do not apply.

Medical Reports

20 C.F.R. § 718.202(a)(4) sets forth:

> A determination of the existence of pneumoconiosis may also be made if a physician, exercising sound medical judgment, notwithstanding a negative x-ray, finds that the miner suffers or suffered from pneumoconiosis as defined in Section 718.201. Any such finding shall be based on objective medical evidence such as blood-gas studies, electrocardiograms, pulmonary function studies, physical performance tests, physical examination, and medical and work histories. Such a finding shall be supported by a reasoned medical opinion.

Although the Claimant has established the presence of clinical pneumoconiosis, the interests of justice require that I discuss legal pneumoconiosis.

"Legal pneumoconiosis is a much broader category of disease" than medical pneumoconiosis, which is "a particular disease of the lung generally characterized by certain opacities appearing on a chest x-ray." ***Island Creek Coal Co. v. Compton***, 211 F.3d 203 at 210 (4th Cir. 2000). The burden is on the Claimant to prove that his coal-mine employment caused his lung disease. 20 C.F.R. § 718.201(a)(2). A disease "arising out of coal mine employment" is one that is significantly related to, or substantially aggravated by, coal dust exposure. 20 C.F.R. § 718.201(b). ***Cornett v. Benham Coal, Inc***., 227 F.3d 569, 576 (6th Cir. 2000).

Dr. Fannin has been the Claimant's treating physician for more than ten years. He diagnosed both clinical and legal coal workers' pneumoconiosis based upon his reasoned opinion and his diagnosis of pneumoconiosis is based upon pulmonary function tests, physical findings, spirometry, use of oxygen and the number of years in his occupational history, clinical findings and symptomotology of the Claimant. He has stated this opinion for a number of years, but in the new evidence, the spirometry performed by Dr. Mettu is considered. DX 52, DX 53. As of March 7, 2003 Dr. Mettu found moderately restrictive airway disease on spirometry. DX 52.

Dr. Jarboes's findings are similar to Dr. Fannin's.

Remarkably, Dr. Jarboe noted in his report that the Claimant "does have changes in his pulmonary function which would be compatible with a dust induced lung disease. He has a proportionate reduction in FVC and FEVI." EX 1. Spirometry indicated the Claimant has a severe restrictive effect. EX 2 at 20, 33. In the deposition, he noted multiple possible causes of impairment, the sternal splitting surgery, including cigarette smoking. The carboxyhemoglobin test result was consistent with smoking a half of a pack of cigarettes per day. Id. 26-27.

However, the deposition is really a sworn statement, because as the Claimant is pro se, Dr. Jarboe was not subject to cross examination. He was not presented with Dr. Poulos' reading of his x-ray. He was not presented with Dr. Mettu's testing report. And he was not asked to specifically comment on the elements of legal pneumoconiosis, despite the comment in his report regarding the effect of exposure to coal dust.

I note that the CT scan is presented. If fully credible, it would show that this Claimant has complicated pneumoconiosis. Dr. Jarboe was directed to a "nodule" in his reading but dismissed it. I note that in cases involving CT scans, a predicate must be laid showing the validity of the scans. In ***Tapley v. Bethenergy Mines, Inc***., BRB No. 04-0790 BLA (May 26, 2005) (unpub.), the ALJ did not abuse his discretion in excluding CT-scan evidence proffered by the employer based on the employer's failure to demonstrate that the test was (1) medically acceptable, and (2) relevant to establishing or refuting the claimant's entitlement to benefits. In accepting the Director's position on this issue, the Board held that, because CT-scans are not covered by specific quality standards under the regulations, the proffering party bears the burden of demonstrating that the CT-scans were "medically acceptable and relevant to establishing or refuting a claimant's entitlement to benefits." See 20 C.F.R. § 718.107(b) (2004). I find that the Claimant failed to do it in this case.

But I discount Dr. Jarboe's opinion's failure to diagnose of legal pneumoconiosis in large part because he places inappropriate reliance on his reading of his x-ray. Legal pneumoconiosis applies in cases where x-ray evidence is not established.

But I find that Dr. Jarboe's position that the Claimant "does have changes in his pulmonary function which would be compatible with a dust induced lung disease," is substantiation and is further support for the rationale of Dr. Fannin.

I find that Dr. Fannin submitted a series of reports and office records that constitute a "reasoned medical opinion" that establishes that legal pneumoconiosis is more than a de

minimus factor in the Claimant's respiratory impairment. ***Grundy Mining Co. v. Director, OWCP [Flynn]***, 353 F.3d 467 (6th Cir. 2003).

CAUSATION

A miner who is suffering or suffered from pneumoconiosis was employed for ten years or more in one or more coal mines, there shall be a rebuttable presumption that the pneumoconiosis arose out of such employment. 20 CFR 718.203(b). I have discounted the diagnosis of Dr Jarboe, who do not accept a diagnosis of pneumoconiosis, which is contrary to the full weight of the evidence. ***Howard v. Martin County Coal Corp.***, 89 Fed.Appx. 487 (6th Cir., 2003, unpbl.). ["ALJ could only give weight to those opinions if he provided specific and persuasive reasons for doing so, and those opinions could carry little weight, at the most." ***Scott v. Mason Coal Co***., 289 F.3d 263 (4th Cir. 2002)]. ***Tapley v. Bethenergy Mines, Inc***., BRB No. 04-0790 BLA (May 26, 2005) (unpub.). The record establishes 21 years of coal mine employment. I credit the opinions of Dr. Fannin on this point. Therefore, I find that the miner's pneumoconiosis arose at least in part out of coal mine employment.

TOTAL DISABILITY DUE TO PNEUMOCONIOSIS

Claimant needs to establish that pneumoconiosis is a "substantially contributing cause" to his disability. A "substantially contributing cause" is one which has a material adverse effect on the miner's respiratory or pulmonary condition, or one which materially worsens another respiratory or pulmonary impairment unrelated to coal mine employment. 20 C.F.R. §718.204(c)(1). The Benefits Review Board has held that §718.204 places the burden on the claimant to establish total disability due to pneumoconiosis by a preponderance of the evidence. ***Baumgardner v. Director, OWCP***, 11 B.L.R. 1-135 (1986).

I credit Dr. Fannin's reports that establish causation. Again, while I discount Dr. Jarboe's opinions as poorly reasoned, his acknowledgment the Claimant "does have changes in his pulmonary function which would be compatible with a dust induced lung disease is support for Dr. Fannin's conclusion that total disability is due to pneumoconiosis. As his diagnosis is contrary to my finding on pneumoconiosis, I attribute more weight to the opinions of Dr. Fannin. ***Cornett v. Benham Coal, Inc.***, 227 F.3d 569, 576 (6th Cir. 2000).

Dr. Fannin and Dr. Jarboe both note that smoking and pneumoconiosis significantly contributed to total disability. I accept the Claimant's testimony that his work required heavy lifting and requires significant stooping and crawling. I accept Dr. Fannin's finding that the Claimant has both severe restrictive and severe obstructive airway disease which are legal pneumoconiosis and which preclude past relevant work. Based on reasons more fully set forth above in the discussion of pneumoconiosis and total disability, I accept this premise.

In applying the Act the Benefits Review Board has ruled that as long as a totally disabling impairment was due to both cigarette smoking and coal dust exposure, that opinion establishes that part of the Claimant's impairment was due to cigarette smoking. See ***Crusenberry v. ABM Coal Company***, BRB No 06-271 (Unpublished, November 24, 2006), citing to ***Cornett***, *supra*, that the impairment was at least in part due to pneumoconiosis. In Crusenberry, the Board evaluated an opinion of Dr. Fannin that is similar to the opinion rendered in this record.

Therefore, I find that pneumoconiosis was a substantial contributing cause to the miner's disability. 20 C.F.R. §718.204(c)(1).

CONCLUSION

The Claimant has proved that his condition has changed and that he has proved all of the elements formerly held against him, 20 CFR § 725.309 and is entitled to modification under 20 CFR § 725.310. However, I have reviewed all of the evidence in this record and modification was not perfected until August, 2006.

ENTITLEMENT

I find that Claimant has established entitlement to benefits. Pursuant to 20 CFR §725.503, benefits are payable as of the month of onset of total disability and if the evidence does not establish the month of onset, benefits are payable beginning with the month during which the claim was filed.

The Claimant was evaluated by Dr. Jarboe in August, 2006. EX 1, EX 2. The x-ray he took at that time was the basis for my finding as to clinical pneumoconiosis. X-rays presented prior to that date were, by a preponderance of the evidence, not dispositive. Likewise4, although Dr. Fannin's longitudinal opinion of legal pneumoconiosis has been accurate, the crucial substantiation as to total disability was not achieved until Dr. Jarboe's testing was submitted.

In assessing total disability under 20 C.F.R. §718.204(c)(4) I must, as the fact-finder, compare the exertional requirements of the claimant's usual coal mine employment with a physician's assessment of the claimant's respiratory impairment. ***Cornett,*** *supra.* (a finding of total disability may be made by a physician who compares the exertional requirements of the miner's usual coal mine employment against his physical limitations); ***Schetroma v. Director, OWCP***, 18 B.L.R. 1-19 (1993) (a qualified opinion regarding the miner's disability may be given less weight). See also ***Scott v. Mason Coal Co.***, 14 B.L.R. 1-37 (1990)(en banc on recon.).

Although Dr. Mettu did find an impairment on spirometry, Dr. Fannin's opinion does not rest on the "moderate" ventilatory defect, an exertional evaluation was not performed until Dr. Jarboe's findings were of record that this factor was fully addressed.

I find that the Claimant was totally disabled due to pneumoconiosis at that time.

Therefore, I find that benefits are payable as of the month during which Claimant perfected the claim, August, 2006.

ORDER

Modification of the claim for benefits filed by **D.R.** is hereby **GRANTED**. Augmentation benefits for one dependent are also granted.

A

DANIEL F. SOLOMON
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: If you are dissatisfied with the decision, you may file an appeal with the Benefits Review Board ("Board"). To be timely, your appeal must be filed with the Board within thirty (30) days from the date on which the administrative law judge's decision is filed with the district director's office. See 20 C.F.R. §§ 725.478 and 725.479. The address of the Board is: Benefits Review Board, U.S. Department of Labor, P.O. Box 37601, Washington, DC 20013-7601. Your appeal is considered filed on the date it is received in the Office of the

Clerk of the Board, unless the appeal is sent by mail and the Board determines that the U.S. Postal Service postmark, or other reliable evidence establishing the mailing date, may be used. See 20 C.F.R. § 802.207. Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

After receipt of an appeal, the Board will issue a notice to all parties acknowledging receipt of the appeal and advising them as to any further action needed.

At the time you file an appeal with the Board, you must also send a copy of the appeal letter to Allen Feldman, Associate Solicitor, Black Lung and Longshore Legal Services, U.S. Department of Labor, 200 Constitution Ave., NW, Room N-2117, Washington, DC 20210. See 20 C.F.R. § 725.481.

If an appeal is not timely filed with the Board, the decision becomes the final order of the Secretary of Labor pursuant to 20 C.F.R. § 725.479(a).